

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA RACING COMMISSION

In the Matter of Proposed Rules of the
Minnesota Racing Commission
Governing Horse Racing, Horse
Medication, Chapter 7890

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Manuel J. Cervantes conducted a hearing concerning the above rules on January 15, 2013, at Canterbury Park, 1100 Canterbury Road, Shakopee, Minnesota.

The Hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable; that they are within the Agency's statutory authority; and that any modifications that the Agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the Agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Minnesota Racing Commission (MRC).

Marlene Swanson,² Administrative Rules Specialist for the MRC, Lynn R. Hovda, DVM,³ MRC Veterinarian, and Dr. Dionne Benson, DVM,⁴ Executive Director and Chief Operating Officer for the Racing Medication and Testing Consortium (RMTC), appeared at the public hearing on behalf of the MRC.

Eight people signed the hearing register and four interested persons spoke at the hearing, including Dr. Thomas Tobin, DVM, PhD,⁵ on behalf of the Minnesota

¹ Minn. Stat. §§ 14.131 through 14.20 (2010).

² Swanson, Hearing Transcript (Tr.) at 11.

³ Hovda, Tr. at 16 and 103.

⁴ Benson, Tr. at 72.

⁵ Tobin, Tr. at 22 and 47.

Horsemen's Benevolent and Protective Association (MHBPA); Cort Holten,⁶ legal counsel for the MHBPA; Jack Walsh,⁷ horse owner and Vice-President of the MHBPA; and Patrice Underwood,⁸ on behalf of the MHBPA.

The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules.

After the hearing ended, the record remained open until February 4, 2013, to allow interested persons and the MRC an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five work-days, or until February 11, 2013, to allow interested persons and the MRC an opportunity to file a written response to the comments submitted. The OAH hearing record closed on February 11, 2013. All comments received were read and considered.

SUMMARY OF CONCLUSIONS

The MRC has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are necessary and reasonable.

Based on the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The MRC is considering rule amendments that will lower the threshold level for phenylbutazone (bute) from five (5) micrograms to two (2) micrograms of the substance or metabolites thereof per milliliter of blood plasma or serum in race horses older than two years old. Second, no concentration of any level of a nonsteroidal anti-inflammatory drug (NSAID), other than bute, would be allowed in the serum or plasma sample taken after a race from a two-year-old horse.

2. There are two parts to this rule change. Part one deals with lowering the permitted post-race level of bute in the horse's system from five (5) micrograms per milliliter of serum or plasma (5 ug/ml) to two (2) micrograms per milliliter of serum or plasma (2 ug/ml). Part two deals with not permitting any post-race level of any NSAID, in the serum or plasma of a two-year-old racehorse, with the exception of bute.

3. Initially, the rule changes proposed to prohibit any post-race level of NSAIDs in two-year-olds, but in October 2012, the MRC amended the rule proposal to allow only post-race levels of bute in two-year-old horses.⁹

⁶ Holten, Tr. at 23 and 35.

⁷ Walsh, Tr. 24 and 102.

⁸ Underwood, Tr. at 27.

⁹ Swanson, Tr. at 11.

4. The Request for Comments was published in the State Register on July 2, 2012.¹⁰ The amended proposed rules and the Statement of Need and Reasonableness (SONAR) were published in the State Register on November 26, 2012.¹¹

5. Bute is a non-steroidal drug with analgesic (pain relieving), antipyretic (temperature lowering), and anti-inflammatory properties. It is widely used in equine veterinary medicine to treat medical conditions associated with soft tissue, muscle, bone, and joint pain. Currently, bute is a permitted medication in Minnesota with post-race levels not to exceed 5 ug/ml serum or plasma of either phenylbutazone or oxyphenbutazone, the major metabolite.¹²

6. Part one of the current rule changes was proposed by MRC to comply with the model rules that were passed in October 2010 by the Racing Commission International (RCI). RCI model rules are proposed and enacted based on input from groups such as the Racing Medication Testing Consortium (RMTTC), the National Thoroughbred Racing Association (NTRA), the American Association of Equine Practitioners (AAEP), the Jockey Club, the Jockey Guild, and the Thoroughbred Owners and Breeders Association (TOBA). One reason for the proposed rule change is to provide the horsemen and women with consistency in the rules and regulations and to avoid the necessity to modify the treatment of their horses because of differing state medication policies as they travel from racetrack to racetrack.¹³

7. Other concerns expressed by the RCI included the fact that elevated levels of bute at the time of pre-race inspection masked signs of inflammation and injury and compromised the horses' pre-race examinations. Pre-race examinations are generally performed 12-16 hours prior to scheduled race times and the level of bute at that time was well elevated, especially if the horse had received bute for several days in a row. The request for change was supported with scientific data from studies in Kentucky, California, and Iowa.¹⁴

8. As of October 2012, of the 20 NTRA states, 12 states had lowered their bute level to 2 micrograms; three states, including Minnesota, Virginia, and Louisiana were under review to lower their bute limits; two states have lowered the level for graded states (Arkansas and West Virginia); and four remain at 5 ug/ml. On August 31, 2012, the Kentucky Horse Racing Commission (KHRC) lowered their level of bute from 5 to 2 ug/ml. In addition, KHRC recommended that each horse be treated as an individual and that dosing be adjusted based on weight and administration time.¹⁵ As of the present, 15 states have passed the 2 microgram limit.¹⁶

¹⁰ Exhibit (Ex.) A.

¹¹ Ex. E.

¹² Ex C at 6.

¹³ Hovda, Tr. at 18.

¹⁴ Ex. C at 6.

¹⁵ Ex. C at 7, Hovda Tr. at 19.

¹⁶ Benson, TR. at 73-74.

9. Part two of the proposed rule change also attempts to promote the safety and well-being of racehorses in Minnesota. Two-year-old horses are the youngest and most vulnerable of the horse groups. These horses are generally stressed by a change in location, feed, training, and medication. Approximately 95% of 2-year-old racehorses in Minnesota train and race with NSAID in their systems. It is not unusual for racehorses to train on ketoprofen or funixin, and switch to bute on race day. The MRC is concerned about the efficacy of this practice of stacking.¹⁷ “Stacking” is defined as more than one NSAID with serum or plasma levels greater than the limit of detection.¹⁸

10. In support of part two of the proposed rule change, MRC sites statistics that show that less than 60% of two-year-old horses in race training in the United States ever actually race. Less than 80% that raced as two-year-olds continue to race as 3-year-olds. Musculoskeletal injuries are as important as are breeding, conformation, and the increased use of drugs.¹⁹

11. Some amount of training and racing of two-year-olds does not appear to be harmful to them and is endorsed by the AAEP and other groups. Not all 2-year-old race horses, however, are 2 years old. Many horses begin training and racing as young as 18-20 months. Horses at this age are not physically or skeletally mature and several growth plates have not yet converted to bone.²⁰

12. Many 2-year-olds in race training succumb to musculoskeletal injuries, especially bucked shins, bowed tendons, splints, and traumatic fetlock (ankle) joint injuries. Injuries in this group are not necessarily acute in nature but are associated with repetitive, overuse motion. Bute and other NSAIDs are frequently used in the treatment of these disorders to allow the horse to continue training and racing when time off may be the best medicine. Further, the administration of different NSAIDs prior to race time may mask these pre-existing injuries resulting in continued damage, unsoundness, and loss of horse, rider, or harness driver’s life.²¹

13. By proposing part two of the rule change, the MCR seeks to protect the two-year-old racehorses from the overuse of NSAIDs by allowing only bute to be present in the post-race sample in a level no greater than 2 ug/ml of serum or plasma.

Rulemaking Legal Standards

14. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the Agency has established the need for, and reasonableness of, the proposed rule by an affirmative presentation of facts. In support of a rule, an Agency may rely upon legislative facts, namely, general facts concerning questions of law, policy, and discretion, or it may

¹⁷ Ex. C at 7.

¹⁸ Hovda, Tr. at 107-08.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

simply rely upon interpretation of a statute or stated policy preferences.²² The MRC prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rule changes. At the hearing, the MRC relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by comments made by MRC representatives at the public hearing, in written prehearing exhibits, and in post-hearing submissions.

15. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.²³ Arbitrary or unreasonable Agency action is action without consideration and in disregard of the facts and circumstances of the case.²⁴ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.²⁵

16. The Minnesota Supreme Court has further defined an Agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the Agency's choice of action to be taken."²⁶ An Agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the Agency. The question is rather whether the choice made by the Agency is one that a rational person could have made.²⁷

17. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with; whether the rule grants undue discretion; whether the Agency has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language is not a rule.²⁸

Procedural Requirements of Chapter 14

18. On July 2, 2012, the MRC published a Request for Comments on the proposed State Register at 37 SR 23.²⁹

²² *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

²³ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

²⁴ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

²⁵ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

²⁶ *Manufactured Housing Institute*, 347 N.W.2d at 244.

²⁷ *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

²⁸ Minn. R. 1400.2100.

²⁹ Ex. A.

19. By letter dated October 16, 2012, the Minnesota Management and Budget (MMB) replied to MCR's request for evaluation and concluded that it believed that the proposed rule changes would have little fiscal impact on local units of government. MMB specifically found that, "the rule changes affect activity on racetrack grounds, not the local community. Local governments are not involved in either the administration or enforcement of these [horse medication] regulations."³⁰

20. In October 2012, the MRC amended a rule from that initially proposed of no NSAIDs to allow only post-race levels of bute in two-year-old horses.

21. By letter dated November 1, 2012, the MRC requested that the Office of Administrative Hearings schedule a hearing on the proposed rules and assign an Administrative Law Judge. Along with the letter, MRC filed a Notice Plan, a copy of the proposed rules, and a draft of the SONAR.³¹

22. Administrative Law Judge Manuel J. Cervantes was assigned to the rule hearing. In a letter dated November 8, 2012, Judge Cervantes approved the Notice Plan.³²

23. By letter dated November 26, 2012, the Office of the Revisor of Statutes approved the final version of the proposed rules.³³

24. On November 26, 2012, a copy of the Notice and the proposed MCR rules, as amended, were published in the State Register at 37 SR 818.³⁴

25. By letter dated January 3, 2013, the MCR sent notice of the proposed rules to the following: Senate Chairs and Ranking Minority Members of the Minnesota Senate Departments and Veterans Division, the Senate Finance Committee, the House Chairs and Ranking Minority Members of the Commerce and Regulatory Reform Committee, and the State Government Finance and Veterans Affairs Committee.³⁵

26. On the day of the hearing, the MRC placed the following documents in the record:

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| Exhibit 1 | Article entitled "The Use of Phenylbutazone in the Horse," accepted for publication 3/20/11 |
| Exhibit 2 | Memo to RMTC Board of Directors from Dr. Arthur, dated 4/12/10 re Background NSAID Recommendation |

³⁰ Ex. H.

³¹ See file.

³² *Id.*

³³ Ex. I, Ex. B.

³⁴ Ex. E.

³⁵ Ex. H.

Exhibit 3	Press Release, dated 4/15/10, "RMTC Recommends New Phenylbutazone Threshold Level, Announces Launch of Recent Rulings
Exhibit 4	Statement of ARCI Regulatory Veterinarian Committee
Exhibit 5	Article entitled "Phenylbutazone Kinetics and Metabolite Concentrations in the Horse After Five Days of Administration," published 11/83
Exhibit 6	Prairie Meadows Historic Catastrophic Breakdown Statistics, 2000 – 2001
Exhibit 7	Statement of Association of Racing Commissioners International, dated 10/25/10
Exhibit 8	Putting the Horse First: Veterinary Recommendations for the Safety and Welfare of the Thoroughbred Racehorse, American Association of Equine Practitioners
Exhibit 9	Posting by Neil Parker entitled, "Bute, DMSO Threshold Levels to Change in Pennsylvania"
Exhibit 10	Current US State Regulations Pertaining to the June 2012 TRA Statement on Equine Safety
Exhibit 11	Screenshot of Paulick Report article entitled, "California Votes to Reduce Bute Threshold," 7/21/11
Exhibit 12	KHRC Medication and Penalty Regulation Changes for Thoroughbred Racing
Exhibit 13	Press Release from Racing Medication and Testing Consortium, dated 8/30/12
Exhibit 14	"Bluegrass Equine Digest" article entitled, "Exercised-Induced Inflammation and Injury in Racehorses," dated 4/12
Exhibit 15	Article entitled, "Closure of the Distal Radial Epiphysis and its Relationship to Unsoundness in Two-Year-Old Thoroughbreds," published online 3/10/08
Exhibit 16	Article entitled, "The Dilemma of Bucked Shins in the Racehorse"
Exhibit 17	Testimony of Susan M. Stover, DVM, from 6/19/08 in a hearing re Breeding, Drugs and Breakdowns: The State of Thoroughbred Horseracing and the Welfare of the Thoroughbred Racehorse
Exhibit 18	Article entitled, "Nonsteroidal Anti-Inflammatory Agents and Musculoskeletal Injuries in Thoroughbred Racehorses in Kentucky," accepted for publication on 10/23/08
Exhibit A	Request for Comments, published in the "State Register"
Exhibit B	Proposed rule, including Revisor's approval
Exhibit C	Statement of Need and Reasonableness dated (November 1, 2012)

Exhibit D	Copy of transmittal, sending SONAR to the Legislative Reference Library
Exhibit E	Notice of Hearing
Exhibit F	Certificate of Mailing and Emailing the Notice of Hearing and Certificate of Accuracy of mailing list
Exhibit G	Copies of additional notices sent by email
Exhibit H	Written comments received during initial comment period
Exhibit I	Other documents
Exhibit J	Letter to Chairman Overton and Mr. Krueger from Dr. Benson, dated 10/11/12
Exhibit K	Letter to Chairman Hartmann and Chairman Lewis from President/Chairman Santanna, dated 10/5/10
Exhibit L	Minnesota Racing Commission packet re rule changes
Exhibit M	Perception vs. Reality
Exhibit N	Minutes from meeting with horsemen, 8/1/12
Exhibit O	Page 11 of the rulemaking docket, posted on the Minnesota Racing Commission website, dated 1/13
Exhibit P	Letter to Chairman Overton from Dr. Tobin, dated 1/15/13, with attachments
Exhibit Q	Letter to Chairman Overton from Dr. Tobin, dated 1/15/13, with attachments
Exhibit R	Summary Curriculum Vitae and Biosketch of Thomas Tobin, DMV, PhD

27. The MRC responses and written public comments received after the hearing were read, considered, and placed in the record.³⁶

28. The Administrative Law Judge finds that the MRC has met all the procedural requirements under applicable law and rule.

Additional Notice

29. Minn. Stat. §§ 14.131 and 14.23, require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules. In addition to notifying those persons on the MRC's rulemaking mailing list for these proposed rules, the MCR represented that it would:

³⁶ See Office of Administrative Hearings website at: <http://mn.gov/oah/administrative-law/comments/>.

- Post the Request for Comments and the language of the proposed rules on the MRC's website
- Mail or email the Request for Comments to Class A & B licensees in Minnesota as well as horsemen's organizations that are affected by horse racing, including the Minnesota Thoroughbred Association, the Minnesota Horsemen's Benevolent and Protective Association, Minnesota Harness Racing, Inc., the Minnesota Quarter Horse Racing Association, the Jockey's Guild, and the United States Trotting Association, and
- Mail or email the Request for Comments to organizations in Minnesota identified as having an interest in animal health, including the Minnesota Board of Animal Health, the Minnesota Humane Society, the Minnesota Veterinary Medical Association, and the University of Minnesota College of Veterinary Medicine.

30. The Administrative Law Judge finds that the MRC fulfilled its additional notice requirement.

Statutory Authorization

31. Minn. Stat. § 240.23, in relevant part, reads, "The commission has the authority, in addition to all other rulemaking authority granted elsewhere in this chapter to promulgate rules governing:

(j) any other aspect of horse racing or pari-mutuel betting which in its opinion affects the integrity of racing or the public health, welfare, or safety.

32. Minn. Stat. § 240.24, subd. 1, in relevant part, reads, "The commission shall make and enforce rules governing medication and medical testing for horses running at licensed racetracks."

33. The Administrative Law Judge finds that the MRC has the statutory authority to adopt the proposed rules. The issue of whether the proposed rules are consistent with the governing statutes is addressed in the part-by-part analysis below.

Regulatory Analysis in the SONAR

34. The Administrative Procedure Act requires an Agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The proposed amendments are intended to provide greater guidance in the use of therapeutic medications in race horses. Class C licenses for race horse owners and trainers will be affected. A positive laboratory test showing any level above the permitted regulatory limit will result in a warning, a fine, or some other penalty (loss of purse, license suspension) to be determined by the Stewards or Judges. The betting public, jockeys, drivers, and horses will benefit in that horses will not be racing with performance enhancing medications in their system.

(2) The probable costs to the Agency and to any other Agency of the implementation and enforcement of the proposed rules and any anticipated effect on state revenues.

There is no anticipated change in costs to the MRC or to any other state or local Agency due to these proposed amendments. The MRC currently tests for these substances, so there should be no increased cost.

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The proposed rule amendments do not change any standard operating procedures in the taking of samples by veterinary staff or testing method that the MRC is currently performing through its testing laboratory. There are no less costly or less intrusive methods for achieving the purpose of the proposed rules.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Agency and the reasons why they were rejected in favor of the proposed rule.

There are no better alternative methods for the amendments to horse medication. The MRC currently tests for the presence of these substances and will continue to do so. These amendments provide regulatory levels that can be used by horsemen, horsewomen, and veterinarians when testing horses.

(5) The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

Costs for sample collection by veterinary staff and laboratory testing costs for medication violations are currently part of the MRC's budget. These costs are reimbursed by its licensed racetracks. No governmental units will be affected. Individual horse owners or trainers will be affected only if testing exceeds the regulatory levels contained in these proposed amendments (e.g., fines, loss of purse, or license suspension).

(6) The probable costs of consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals.

With the proposed amendments to medications, the MRC attempts to provide the horsemen and women with guidance regarding the use of this medication. Not adopting the rule may result in an increased number of two-year-old racehorses that are infirm or unsound as a consequence of the inability to diagnose injury as a result of excessive or repeated use of this medication.

(7) An assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

There are no current federal rules regarding the establishment of regulatory limits for this medication.

The Administrative Law Judge finds that the MRC has adequately considered the cost of its proposed amendments and it has adequately considered the other factors in the regulatory analysis required by Minn. Stat. § 14.131.

Performance-Based Rules

35. The Administrative Procedure Act³⁷ also requires an Agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the Agency's regulatory objectives and maximum flexibility for the regulated party and the Agency in meeting those goals.³⁸

36. The MRC states that the proposed rules affect horse racing and are being proposed as a means to strengthen the integrity of this form of legalized gambling. Any actual occurrence or even the perception that the integrity has been compromised would have a disastrous effect on not only the racetracks but also on those that compete at the racetracks, many of whom rely on this activity for their livelihood. It is important that the MRC stay current on national issues, including national medication standards which the proposed rules address.

37. The Administrative Law Judge finds that the MRC has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

³⁷ Minn. Stat. § 14.131.

³⁸ Minn. Stat. § 14.002.

Consultation with the Commissioner of Finance

38. Under Minn. Stat. § 14.131, MRC is also required to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

39. The MRC consulted with Minnesota Management and Budget (MMB). By letter dated October 16, 2012, the MMB replied to MCR’s request for evaluation and concluded that it believed that the proposed rule changes would have little fiscal impact on local units of government.³⁹

40. The Administrative Law Judge finds that the MRC has met the requirements set forth in Minn. Stat. § 14.131.

Compliance Costs to Small Business and Cities

41. Under Minn. Stat. § 14.127, state agencies must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”⁴⁰ Although this determination is not required to be included in the SONAR, the Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁴¹

42. The MRC states in the SONAR that it has determined that the cost of complying with the proposed rule amendments in the first year after the rules take effect will not exceed \$25,000 for any one small business or small city. The MRC has no regulatory authority over businesses or cities.

43. The Administrative Law Judge concludes that the MRC has met the requirements set forth in Minn. Stat. § 14.127 for determining whether the cost of complying with the proposed rules in the first year after the rules take effect, will not exceed \$25,000 for any small business or small city. The Administrative Law Judge approves that determination.

Adoption or Amendment of Local Ordinances

44. Under Minn. Stat. § 14.128, an Agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed rule. The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁴²

³⁹ Ex. H.

⁴⁰ Minn. Stat. § 14.127.subd. 1.

⁴¹ Minn. Stat. § 14.127, subd. 2.

⁴² Minn. Stat. § 14.128, subd. 1.

45. The MRC concludes that the proposed rules do not necessitate local government action because the proposed rules contain no provision that would affect the law or regulations of a town, home rule charter, or statutory city.⁴³

46. The Administrative Law Judge finds that the MRC has made the determination required by Minn. Stat. § 14.128, and approves that determination.

47. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b requires that at least one public hearing be conducted in an agricultural area of the state.

48. The proposed rules do not impose restrictions on or have a direct impact on farming operations. Accordingly, the Administrative Law Judge concludes that the MRC was not required to notify the Commissioner of Agriculture of these proceedings.

Analysis of Proposed Rules

General

49. This Report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise required close examination. Accordingly, this Report will not address each comment.

50. When rules are adequately supported by the SONAR or the Agency's oral or written comments, a detailed discussion of the proposed rules is unnecessary.

51. The Administrative Law Judge finds that the MRC has demonstrated the need for, and reasonableness of, both rule provisions discussed in this Report by an affirmative presentation of facts. Further, the Administrative Law Judge finds that both provisions are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rules

Part 7890.0100, subp. 13 A (1) (a).

52. In this subpart, the MRC proposes to lower the detectable level of bute in a horse's system from 5 micrograms per milliliter of serum or plasma to 2 micrograms per milliliter of serum or plasma in order to come into compliance with the national standard as established by the Racing Commissioners International (RCI). Consistency of regulation from state-to-state obviates the horsemen's need to treat their horses differently as they move from one racetrack to another across state boundaries.⁴⁴

⁴³ Ex. C at 6.

⁴⁴ Hovda, Tr. at 18.

53. This rule change was in response to regulatory veterinarians who expressed considerable concern that the levels of bute in the serum and plasma during pre-race inspection of horses were elevated and this masked the veterinarians' ability to do effective pre-race examinations.⁴⁵

54. Dr. Thomas Tobin appeared on behalf of the Minnesota Horsemen's Benevolent and Protective Association (MHBPA). Dr. Tobin is a professor at the University of Kentucky. He teaches toxicology and veterinary sciences. He spoke about the difficulty of complying with the 2 microgram per milliliter threshold. Based on his review of the research data, and, in particular, a Florida study sponsored by the RMTC, approximately 8% of the horses tested were over the 2 microgram per milliliter threshold.⁴⁶ This is due to "horse to horse variability in phenylbutazone elimination" and is "not controllable by any management options."⁴⁷

55. Dr. Tobin's point being that at this level, violations of the 2 microgram standard are going to occur. He acknowledged that the RMTC recommended to the Pennsylvania Commission that the weight of the horse be taken into consideration in determining exactly how much bute to administer, and that the time of administration should be pushed back from 24 hours to 36 hours before race time; allowing more time for the bute to dissipate.⁴⁸ Dr. Tobin adopted neither of these recommendations to avoid positive test results.

56. Dr. Tobin noted there are substantial costs to the horsemen associated with challenging a tracks' finding of a violation for exceeding the threshold. A horseman could incur a split sample testing charge of as much as \$500, legal representation costs, if requested, and a penalty for a violation.⁴⁹ Dr. Benson, on the other hand, indicated that, based on the RMTC's national lab charge data base, the costs of a split sample test range from \$50 - \$200.⁵⁰ In Minnesota, the cost is approximately \$250.⁵¹

57. Dr. Tobin also indicated that given the rationale for the proposed rule, specifically, to reduce the likelihood of musculoskeletal injuries and fatalities, he recommended that MRC postpone its rulemaking to await the results of a national study looking at the impact the reduction of bute from 5 to 2 micrograms per milliliter would have on musculoskeletal injuries.⁵²

58. Cort Holten, legal counsel for the MHBPA, appeared on behalf of this organization. He suggested that this rule could be implemented over a period of years: for example, reduce bute to 4 micrograms per milliliter in year one, to 3 micrograms in

⁴⁵ *Id.*

⁴⁶ Tobin, Tr. at 56-60.

⁴⁷ *Id.*, Tr. at 55, Ex. P.

⁴⁸ *Id.*, Tr. at 61.

⁴⁹ *Id.*, Tr. at 59-60.

⁵⁰ Benson, Tr. at 78.

⁵¹ Hovda, Tr. at 78.

⁵² Benson Tr. at 69-70.

year two, and to 2 micrograms in year three.⁵³ While this proposal may not be unreasonable, this does not make the MRC's immediate implementation of the proposed rule irrational.

59. Dr. Diane Benson, DVM, appeared on behalf of the MRC. Dr. Benson is the Executive Director and Chief Operating Officer for the Racing Medication and Testing Consortium. She pointed out that in two-year-olds, a concern the rule attempts to address relates to bute's interference on the gastrointestinal lining and the negative effect on kidneys and other organs.⁵⁴

60. In response to one of Dr. Tobin's concerns, Dr. Benson indicated that she requested violation data from the RCI. The data she requested were the number of violations found six months prior to the effective date of the 2 microgram standard and violations found six months after the effective date of the rule change. The RCI reported that there were 40 violations before the 2 microgram standard was implemented for seven states that had such data. In the six months after the rule was changed, there were 18 violations, or a 55% decrease in violations. She indicated that they are not seeing the dramatic rise in violations that some were anticipating.⁵⁵ It appears that quite the opposite is occurring.

61. With respect to musculoskeletal or catastrophic fatalities, Dr. Benson indicated that when Prairie Meadows (Iowa) changed from 2 to 5 micrograms per milliliter, they saw an increase in their fatalities. The highest they had in eight years of data was 14. After the rule change to 5 micrograms it rose to 16 fatalities. Later, when Prairie Meadows reduced to 2 micrograms, its fatality rate decreased to four. She attributed the decrease, in part, because at the 2 microgram per milliliter level, the horse was in a less altered state, the regulatory vets could conduct a more accurate pre-race examination, permitting them to detect lameness or other injuries, and thereby, protecting the horse from further injury or death.⁵⁶

62. Dr. Benson also responded to the issue raised by Mr. Holten and what ramifications would occur if the rule was implemented immediately, rather than incrementally, as suggested by Mr. Holten. In a recent study in Florida, where the 2 microgram rule change was implemented immediately, they found that of the 20 horses sampled, none of them violated the rule. Under the new standard, Dr. Benson reiterated that trainers will have to be more vigilant about the weight of a horse and by inference, adjust the bute dose accordingly. A standard 2 gram dose of bute, regardless of the weight of the horse, may lead to a positive test result.⁵⁷ According to Dr. Benson, weight is crucial; one [standard] dose amount [of bute] does not fit all.⁵⁸

⁵³ Holten, Tr. at 44.

⁵⁴ Benson, Tr. at 73.

⁵⁵ *Id.*, Tr. at 77.

⁵⁶ *Id.*, Tr. at 85.

⁵⁷ *Id.*, Tr. at 92.

⁵⁸ Hovda, Tr. at 107.

63. The Administrative Law Judge finds that MRC's rule change in part 7890.0100, subp. 13 A (1) (a), lowering the bute level from 5 to 2 micrograms per milliliter is needed and reasonable. The MRC has offered rational explanations for the change.

Part 7890.0100, subp. 13 A (1).

64. In this subpart, the MRC proposes to limit the use of NSAIDs in two-year-olds to only one anti-inflammatory drug, bute. The rationale behind this rule change is that statistics in the United States shows that of the two-year-old horses in race training, 60% of the two-year-olds actually enter or make it to a race. Less than 80% of two-year-olds that raced continue to race as three-year-olds. In other words, less than 50% of horses that raced as two-year-olds go on to race as three-year-olds.⁵⁹

65. Musculoskeletal injuries or injuries to the joints and soft tissue play a significant role and, in part, explain the substantial decline in two-year-old race horses. Confirmation illness and death also contribute to the reduction in two-year-old race horse numbers.⁶⁰

66. While it may not be unreasonable for two-year-olds to train or require NSAID such as bute, it appears unreasonable to "stack" NSAID agents; for instance, using Flunixin on one day, Ketoprofen on the next, and then on race day, use only bute because only one agent can be used on that day.⁶¹

67. Research data shows that some of the race horses had not just one, but as many as four nonsteroidal anti-inflammatory agents in their system on race day. Two-year-olds are the youngest and most vulnerable of the group and need protection. The proposed rule would limit NSAID agents to one, bute, so as to avoid adverse gastrointestinal ulcers, or a chronic injury that goes on to become more chronic until the horse is no longer able to function as a racehorse.⁶²

68. The Administrative Law Judge finds that MRC's rule change in part 7890.0100, subp. 13 A (1), limiting the use of NSAID in two-year-olds to only bute is needed and reasonable. The MRC has offered rational explanations for the change.

CONCLUSIONS

1. The Minnesota Racing Commission gave proper notice of the hearing in this matter.

2. The MRC has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

⁵⁹ *Id.*, Tr. at 20.

⁶⁰ *Id.*

⁶¹ *Id.*, Tr. at 20-21.

⁶² *Id.*

3. The MRC has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The MRC has demonstrated the need for, and reasonableness of, its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

5. A Finding or Conclusion of need or reasonableness with regard to any particular rule part does not preclude, and should not discourage, the MRC from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon the facts appearing in this rulemaking record.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted.

Dated: March 19, 2013

/s/ Manuel J. Cervantes
MANUEL J. CERVANTES
Administrative Law Judge

Reported: Transcript Prepared by:
Colleen M. Sichko
Shaddix & Associates

NOTICE

The MRC must make this Report available for review by anyone who wishes to review it for at least five working days before the MRC takes any further action to adopt final reviews or to modify or withdraw the proposed rules. If the MRC makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the MRC must submit the final version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the MRC, and the MRC will notify those persons who requested to be informed of their filing.

When the rule is filed with the Secretary of State by the Office of Administrative Hearings, the MRC must give notice to all persons who requested that they be informed of the filing.